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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 422

CITY OF KANSAS CITY, MISSOURI,
a Municipal Corporation,
Petitioner,

vs.

FEDERAL PACIFIC ELECTRIC COMPANY,
Respondent.

No.

CITY OF KANSAS CITY, MISSOURI,
a Municipal Corporation,
Petitioner,

vs.

GENERAL ELECTRIC COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

KEITH WILSON, JR.,
City Counselor,
WILLIAM F. MAUER,
Assistant City Counselor,
2800 City Hall,
Kansas City, Missouri,
Attorneys for Petitioner.

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioner, City of Kansas City, Missouri, prays that a Writ of Certiorari issue to the United States Court of Appeals for the Eighth Circuit to review the judgment of the United States District Court for the Western District of Missouri entered in the above case on July 16, 1962.

OPINIONS BELOW.

The opinion and order of the District Court dated August 3, 1962, is unreported and is printed in Appendix "A" attached hereto, *infra*, pp. A1-A13.

JURISDICTION.

The decision of the District Court was entered on July 16, 1962, pp. A24-A38, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED.

Whether or not the Federal doctrine of Fraudulent Concealment will toll Section 4B of the Clayton Act (15 U.S.C. 15(b)).

STATEMENT OF THE CASE.

Each of the complaints in the above entitled cases asserts a claim for treble damages under Section 4 of the Clayton Act (15 U.S.C. 15), resulting from a conspiracy to fix prices on specified types of electrical equipment in violation of Section 1 of the Sherman Act (15 U.S.C. 1); each of the respondents in the above cases moved for an order of the District Court dismissing the complaints pursuant to Rule 12 of the Federal Rules of Civil Procedure, or in the alternative for a Summary Judgment dismissing the complaints pursuant to Rule 56 of the Federal Rules of Civil Procedure, for the reason that each complaint shows on its face that the petitioner's claim is barred by the applicable statute of limitations (Section 4B of the Clayton Act (15 U.S.C. 15(b)). The District Court after acceptance of briefs and hearing oral arguments sustained both respondent's motions on July 16, 1962.

Petitioner filed its Notice of Appeal on the same day the order sustaining respondent's motion was entered, July 16, 1962.

Motion to advance the cause on the docket was filed with the United States Court of Appeals for the Eighth Circuit on the 26th day of July, 1962. The Court of Appeals sustained this motion and the matter is now set for hearing on October 2, 1962.

STATUTES INVOLVED.

Clayton Act, Section 4 (15 U.S.C. 15). Suits by persons injured; amount of recovery.

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Clayton Act, Section 4B (15 U.S.C. 15(b)). Limitation of actions.

> "Any action to enforce any cause of action under sections 15 and 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 6 of this title shall be revived by said sections."

Clayton Act, Section 5 (15 U.S.C. 16). Judgment in favor of Government as evidence; suspension or limitations.

* * *

"(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter; Provided, however, that whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder; any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

REASONS FOR GRANTING THE WRIT.

1. The decision of the court below in the instant cases are in direct conflict with the decision of Judge Feinberg in *Atlantic City Electric Company* v. *General Electric Co. et al.*, (District Court of the Southern District of New York (July 11, 1962) 61 Civ. 4258 unreported, Appendix "B"). It is further noted that Judge Becker's decision in the instant case made note of the fact that the District Court of the Southern District of New York had made a contrary determination in its finding upon the same type of motion. Judge Becker further commented upon the status of the law and of the necessity of an early review by the highest court. Said the court, in the memorandum opinion, p. A6.

"* * * *In order to hasten the full review of the legal questions by the highest court by which they are reviewable*, this court has decided to sustain both the motion to dismiss and the motion for summary judgment. * * *." (Italics supplied).

2. At the present date there have been three decisions upon the question of whether or not the federal doctrine of fraudulent concealment tolls the statute of limitations contained in Section 4B of the Clayton Act. These are *Moviecolor, Ltd., v. Eastman Kodak Company*, 288 F.2d 80 (2d Circuit 1961) Certiorari denied 368 U.S. 821 (1961); *Dovberg* v. *Dow Chemical Company*, 195 F. Supp. 337 (Eastern District of Pennsylvania, 1961), and *Atlantic City Electric Company* v. *General Electric Company et al., supra.* All three of these decisions have held the doctrine of fraudulent concealment to be applicable to Section 4B of the Clayton Act, and the latest case, *Atlantic City Electric Company*, specifically held that a motion to strike, based upon Section 4B, would be denied where the complaints alleged the elements of fraudulent concealment. The instant case is the sole decision extant which refuses to apply the doctrine of fraudulent concealment to Section 4B.

3. As noted in the District Court's decision in the instant case (Appendix A) there are currently in excess of 1,700 treble damage actions grounded in the same fact structure as the instant case. Each of these cases has been classified as a "big case" and has been subjected to the procedure relating to protracted litigation under the auspices of the Judicial Conference of the United States. (Report of Judicial Conference Study Group, 1960, 25 F.R.D. 35.) This mass of litigation is seriously taxing the federal docket at the district court level, and, as noted by Judge Becker in his decision in the instant case, the system is sorely challenged in its capacity to administer the antitrust laws of the United States due to the quantum of electrical company conspiracy cases.

All of this pending litigation will be affected by the ultimate determination of the applicability of the federal

doctrine of fraudulent concealment to Section 4B of the Clayton Act. Until this question has been finally determined, discovery procedures in the over 1,700 pending District Court cases cannot proceed due to the impossibility of accurately limiting the scope of discovery. It is submitted that as a result of Judge Becker's decision, this mass of litigation is at a standstill until a final determination of the question is made. It is further submitted that an early decision on this issue by this Court will prevent piecemeal appeal in the over 1,700 cases pending at the District Court level.

It is respectfully suggested that the public interest and the effective judicial administration of the antitrust laws of the United States necessitates the earliest possible determination of this key question.

CONCLUSION.

For the foregoing reasons, it is submitted that the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

KEITH WILSON, JR.,
City Counselor,
WILLIAM F. MAUER,
Assistant City Counselor,
2800 City Hall,
Kansas City, Missouri,
Attorneys for Petitioner.

Dated August ..., 1962.

On the exact date this petition was printed and returned to the petitioner another decision was rendered in this matter by the District Court for the Northern District of Illinois. The decision is also unreported and is attached to this petition marked Exhibit "C".

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

CITY OF KANSAS CITY, MISSOURI, a Municipal Corporation, Plaintiff.
vs.
FEDERAL PACIFIC ELECTRIC COMPANY, Defendant.
Civil No. 13709-1

CITY OF KANSAS CITY, MISSOURI, a Municipal Corporation, Plaintiff.
vs.
GENERAL ELECTRIC COMPANY, Defendant.
Civil No. 13710-2

Memorandum Opinion.

These two cases are antitrust actions at law for treble damages under Section 4 of the Clayton Act (15 U.S.C. 15) based upon alleged conspiracies in violation of Section 1 of the Sherman Act (15 U.S.C. 1). The actions arise out of the same alleged conspiracies which were the basis for indictments of manufacturers of electrical equipment products in the United States District Court for the Eastern District of Pennsylvania at Philadelphia in 1960, followed by convictions in 1961. Both actions were filed February 9, 1962.

These two cases are a part of the mass of civil antitrust cases filed in the United States District Courts fol-

lowing the indictments and convictions in Philadelphia. The number of such cases filed and pending in the nation presently exceeds 1700. Each of these cases is a "Big Case" and is properly classifiable as protracted litigation under the procedures for identification and processing of such cases, developed and published under the auspices of the Judicial Conference of the United States. (Report of Judicial Conference Study Group on Pretrial Procedure in Protracted Litigation (1960) 25 R.R.D. 35.)

This mass of litigation challenges the capacity and ability of the judicial system of the United States to perform its task of administering the antitrust laws of the United States in particular and to administer justice under law in general. (To meet this challenge to assist the United States courts struggling with the adjudication of these cases, a National Coordinating Committee for Multiple Litigation has been created. This Committee has established offices in Chicago and New York. The Committee is issuing recommendations for cooperative national action by the district courts and is disseminating informative material to the courts.)

One of the legal problems demanding earliest solution in order to provide a guide to courts and litigants for pretrial proceedings, trial, and any settlement negotiations that may occur, is the construction to be given to the applicable statute of limitations, Section 4B of the Clayton Act (15 U.S.C. 15(b)), which is dealt with in this memorandum opinion. It is imperative that this question be promptly decided at the highest judicial level at the earliest time consistent with law. Until this question is settled, the scope of discovery cannot be settled by the trial courts; the pleadings cannot be settled; the potential damages cannot be computed; and settlement negotiations cannot be fully explored in a great number of cases. There-

fore, counsel in the 71 cases pending in this district were requested to take steps to expedite final determination of the construction to be given to Section 4B of the Clayton Act in light of the claim that the four-year period of limitations provided thereby does not begin to run until the plaintiff, in a particular case, knows of the existence of the alleged conspiracy, or by the exercise of reasonable diligence could have learned of the existence thereof.

Fortunately, it was discovered that, in these two actions instituted by the City of Kansas City, all purchases relied upon in the claims for relief occurred in 1954, more than four years prior to the time when the plaintiff alleges it knew, or in the exercise of reasonable diligence could have known, of the existence of the alleged conspiracy.

Counsel for the plaintiff, Kansas City, was granted leave to amend the complaints to aver all facts which might possibly be proved to avoid the limitation of these actions by Section 4B of the Clayton Act.

AVERMENTS OF THE COMPLAINTS.

The First Amended Complaint, in each of these cases, charges the formation and existence of an actionable combination and conspiracy in violation of Section 1 of the Sherman Act, beginning at least as early as 1948, and consequent damage to plaintiff arising out of purchases in the year 1954 only. (The items purchased in Case No. 13709-1 were circuit breakers, and in Case No. 13710-2 were power switching equipment.)

Said complaint in each case charged the indictment of the defendants in the United States District Court for the Eastern District of Pennsylvania on May 19, 1960, and subsequent conviction because of the same alleged conspiracy on which the complaint is based.

In order to show that the actions are not barred by Section 4B of the Clayton Act, the complaint in each case contains a paragraph 13 under the subheading "Fraudulent Concealment" which reads as follows:

"From the inception of the combination and conspiracy between defendants described in paragraphs 9, 10 and 11, which was at least as early as January 1, 1948, and continuously thereafter until at least May 25, 1960, defendants resorted to and maintained in effect various procedures and means for the purpose of concealing the existence of their conspiracy. These included secret meetings of officers and employees of the defendants at various places in the country, the placing of telephone calls to and from the residences of company representatives rather than their offices, the use of public pay telephones, the use of plain envelopes addressed to the homes of such representatives without any return addresses or other means for identifying the senders, and the concealment or destruction of records respecting the conspiracy. During all of the period of time mentioned above, defendants established and used a scheme or formula designated the 'phase of the moon' or 'light of the moon' formula, for quoting nearly identical prices to electrical utility companies and municipal corporations, including plaintiff. Code numbers identifying the defendant corporations were used in documents effectuating said 'phase of the moon' formula. Through the cyclic rotating positioning inherent in said formula, one defendant corporation would quote the low price, others would quote intermediate prices, and another would quote the high price. These positions were periodically rotated among the defendant corporations and said formula was so calculated that in submitting prices to electrical utility companies and municipal corporations, including plaintiff, the price spread between defendant corporations would be sufficiently narrow so as to eliminate actual price competition among them but sufficiently wide so as to give an ap-

pearance of competition. Said formula was designed to permit each defendant corporation to know the exact price it and every other defendant corporation would quote on each prospective sale. By the use of said formula and other means defendants rigged price quotations and bids to purchasers, including plaintiff, and so represented their prices to plaintiff as to give the appearance of competitive bidding and pricing and by such means caused plaintiff to believe that it was receiving competitive prices. By such means and through other deliberate acts defendants from the inception of said conspiracy and continuously thereafter until at least May 25, 1960, fraudulently concealed the existence of their combination and conspiracy and plaintiff had no knowledge, nor could it by the exercise of reasonable diligence have obtained knowledge, of the existence of said combination and conspiracy until after the institution of the proceedings described in paragraph 12."

The defendants have moved to dismiss or for summary judgment on the grounds that: (1) plaintiff's complaint under Section 4 of the Clayton Act was filed February 1, 1962, and amended March 3, 1962; (2) the amended complaint shows on its face that the claim for relief of plaintiff accrued more than four years prior to the date upon which plaintiff's complaint was filed; (3) Section 4B of the Clayton Act provides that any cause of action under Section 4 of the Clayton Act shall be forever barred unless commenced within four years after the cause of action accrued; (4) Section 4B of the Clayton Act is substantive rather than procedural in character, is absolute, and cannot be tolled for fraudulent concealment of the cause of action, pending discovery thereof.

The plaintiff has agreed that the motions to dismiss and for summary judgment are in condition for decision on the averments of the First Amended Complaint. There-

fore the rule of *Poller* v. *C.B.S.*, 368 U.S. 464, 7 L. Ed. 2d 458, is not applicable to the motion for summary judgment in these cases.

DECISION.

These cases have been fully and ably briefed and argued in this Court by counsel for the parties and by counsel in the nine companion cases which will be substantially affected by the decision in these cases. The presentation of counsel on both sides deserves a careful review of the arguments, authorities and reasoning. More important, however, is a speedy decision in a form which will reach, as soon as possible, the highest judicial level for review and final determination. At this district court level, and in the present state of the authorities, the question could honestly be decided either way. In fact, the decisions of the district courts on the general question have been conflicting. In order to hasten the full review of the legal questions by the highest court by which they are reviewable, this Court has decided to sustain both the motion to dismiss and the motion for summary judgment, with a brief review of the contentions of the parties and of the friends of the Court, to whom the Court is indebted for their excellent arguments and briefs.

STATE OF AUTHORITIES.

The question presented in these cases has not been directly passed upon by the Supreme Court of the United States. It is claimed by the plaintiff, and denied by the defendants, that the question was decided by the Court of Appeals for the Second Circuit in *Moviecolor, Ltd.*, v. *Eastman Kodak Co.*, 288 F.2d 80. The District Court for the Eastern Districts of Pennsylvania has upheld the views of the plaintiff in *Dovberg* v. *The Dow Chemical Co.*, 195 F. Supp. 337. The District Court for the Southern District

of New York has adopted plaintiff's view of the *Movie-color* case in *Atlantic Electric Co.* v. *General Electric Co.*, No. 61 Civ. 4258, dated July 11, 1962 (not yet reported). The Court's attention has been invited to no other decision on the issue accompanied by written opinion.

Therefore, it is concluded that this is an unsettled question of great importance.

BASIS OF DECISION.

The basis for the decision in these cases, that the "fraudulent concealment" averments of paragraph 13 of the complaint do not suspend the running of the four-year period, is the determination that Congress did not intend that the running of the four-year period of limitations be suspended by fraudulent concealment of the prohibited conspiracy.

This conclusion is by no means free of doubt. Cogent arguments can be, and have been, made in support of a contrary determination.

In reaching the determination that Congress did not intend that the running of the statute be suspended by active fraudulent concealment, a distinction is recognized between active fraudulent concealment and lack of discovery by the injured party unaccompanied by activity designed to conceal the existence of the conspiracy. The considerations which have led to the decision made in the cases at bar are the following:

I.

Section 4B does not contain an express exception suspending the running of the four-year period until discovery of the wrong or during the time the wrong was fraudulently concealed, such as contained in the Tariff

Act of 1930 (19 U.S.C. 1621) and in the Securities and Exchange Act (15 U.S.C. 78r(c)). Furthermore, section 5(b) creating an exception during the pendency of a civil or criminal proceeding instituted by the United States is evidence of the intent of Congress to limit exceptions to 4B to the provisions of section 5(b) (15 U.S.C. 16). So the Clayton Act is not silent on the subject matter of suspension of the running of, and exceptions to, the limitations set forth in section 4B.

II.

The legislative history of section 4B in the 81st, 82nd, 83rd and 84th Congresses contains evidence that express provisions suspending the running of the statutes until the date of discovery were deliberately eliminated in the perfection of the Bill before final passage by the 84th Congress. In this connection it is noted that there is a confusing colloquy between Committee Chairman Celler and Congressman Patman on this subject appearing at 101 Congressional Record 5132-5133 which contains ambiguous statements lending some aid to the position of the plaintiff. (A brief summary of legislative history and a transcript of the Celler-Patman colloquy is attached and marked Exhibits A and B respectively.)

III.

The decision of this Court is supported by the long-established rule that, when Congress creates a new right of action and explicitly limits the time in which the action may be brought, the explicit limitation governs and is not affected by the general federal doctrine employed to bar inequitable reliance on statutes of limitation. Some doubt is cast upon the applicability of this rule by *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231, 3 L. Ed. 2d 770, l.c. 773. Nevertheless, the rule has been long estab-

lished in federal jurisprudence and is of some value in ascertaining congressional intent. This rule found its earliest and widest application in the field of conflict of laws in cases involving suits on causes of action created by a statute of a state other than the forum, as in statutory actions for wrongful death. *Restatement, Conflict of Laws*, Sec. 605 (1935); Beale, *The Conflict of Laws*, Sec. 605. This rule has been followed or recognized in federal jurusprudence in the following cases, among others:

State statutes involved: *Davis* v. *Mills*, 194 U.S. 451, 48 L. Ed. 1067; *The Harrisburg*, 119 U.S. 199, 30 L. Ed. 358.

Federal statutes involved: *Midstate Horticultural Co.* v. *Pennsylvania R.R.*, 320 U.S. 356, 88 L. Ed. 96; *William Danzer & Co.* v. *Gulf & Ship Island R.R.*, 268 U.S. 633, 69 L. Ed. 1126; *United States ex rel. Louisville Cement Co.* v. *Interstate Commerce Comm.*, 246 U.S. 638, 62 L. Ed. 914, all dealing with the Interstate Commerce Act; *United States ex rel. Texas Portland Cement Co.* v. *McCord*, 233 U.S. 157, 58 L. Ed. 893 dealing with Materialmen's Act.

The rule is applicable even though the period of limitation is provided in a different, subsequent legislative act provided the subsequent act is directed to the legislatively created cause of action. *Davis* v. *Mills*, 194 U.S. 451, 48 L. Ed. 1067.

The rule seems applicable in a treble damage cause of action, under Section 4 of the Clayton Act, which was created by congressional act in 1914, and which replaced Section 7 of the Sherman Act. Section 4B containing the four-year limitation was enacted in 1955 and became effective in 1956. It became, by amendment, a part of the Clayton Act which created the treble damage cause of action.

This rule is characterized by the holding that lapse of the prescribed time operates to extinguish the right, which is the foundation for the claim, rather, than to bar the enforcement thereof. *Midstate Horticultural Co.* v. *Pennsylvania R.R.*, 320 U.S. 356, l.c. 359, 88 L. Ed. 96, l.c. 100.

The rule is recognized in *Holmberg* v. *Armbrecht*, 327 U.S. 392, 90 L. Ed. 743, relied upon the plaintiff, in the following language:

> "If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive." (327 U.S. l.c. 395, 90 L. Ed. l.c. 746).

Undoubtedly there are general federal doctrines providing relief for the victims of fraud which are read into every federal statute of limitations where Congress is silent on the matter. *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231, 3 L. Ed. 2d 770. *Holmberg* v. *Armbrecht, supra; Exploration Co.* v. *United States*, 247 U.S. 435, 62 L. Ed. 1200; *Bailey* v. *Glover*, 88 U.S. (21 Wall.) 342, 22 L. Ed. 636; Annotations, 3 L. Ed. 1886, 130 A.L.R. 8, supp. 24 A.L.R. 2d 1413. As stated earlier, generally these doctrines are not applicable where there is a newly created statutory cause of action and a special statute explicitly limiting the time for action thereon. But there are cases where the general federal doctrines are applied to special statutes of limitation applicable to legislatively created or expanded causes of action which did not exist before. *Glus* v. *Brooklyn Eastern District Terminal, supra*, a unanimous opinion in a Federal Employers' Liability Act case; Annotation, 3 L. Ed. 2d l.c. 1888.

All this brings us back to the critical inquiry under *Glus* and *Holmberg*, whether in respect of the particular

cause of action, Congress has explicitly or clearly indicated its intention to exclude application of general doctrines suspending tolling of, or estopping the application of, statutes of limitations.

Whether the statute clearly shows an intention to exclude the application of general doctrines is a matter of opinion which can be settled finally only by the court of last resort.

IV.

Some consideration must be given to the subject matter of the new cause of action. It is conceivable that general equitable principles of estoppel may be applicable to limitations in Federal Employers' Liability Act cases involving tort actions by employees, as held in *Glus*, and the same principles be inapplicable in actions based on conspiracy which is ordinarily secretive in nature. The fact that Congress, in enacting section 4B, was legislating against conspiracies ordinarily concealed, is entitled to some consideration in determining the congressional intent.

V.

The foreseeable effects of the application of equitable principles of suspension and estoppel upon the ability of the courts to process anticipated litigation should be given some consideration. In this connection there is the practical consideration that these antitrust cases and other cases ordinarily on the dockets may overtax the capacities of the courts if the period of limitation can be extended backward in time as contended by the plaintiff. Congress should be assumed to have had in mind the capacity of the courts to process the authorized litigation. If plaintiff's contention is sustained there is no definite limit in time beyond which treble damage actions are barred.

For these five reasons, among others, the conclusion is reached that the motions to dismiss and for summary judgment should be sustained.

Before closing, consideration should be given to the *Moviecolor* case relied upon by the plaintiff.

THE MOVIECOLOR CASE.

In a thoughtful opinion, Judge Feinberg of the District Court for the Southern District of New York has reached a conclusion contrary to that expressed in this memorandum. *Atlantic Electric Co.* v. *General Electric Co.*, No. 61 Civ. 4258, dated July 11, 1962. This conclusion was based upon an analysis of the opinion of the Court of Appeals for the Second Circuit in *Moviecolor, Ltd.*, v. *Eastman Kodak Co.*, 288 F.2d 80. *Moviecolor* is binding on the District Courts of the Second Circuit and strongly persuasive in its holding. There is a considerable difference of opinion concerning the interpretation to be given to *Moviecolor*. There is a serious question whether, viewed in the light most favorable to plaintiff, *Moviecolor's* holding is *dictum*. The Southern District of New York in *Atlantic Electric* took the position that even if *Moviecolor* was *dictum* on this issue, it was controlling. This Court is not compelled to take the same position in the absence of any expression by the Court of Appeals for the Eighth Circuit. Therefore, the refinements of *Moviecolor* will not be discussed. Judge Feinberg seems to have made a scholarly appraisal of that case in *Atlantic Electric*, but *Moviecolor*, although entitled to great respect, is not final in any view because the court rendering the opinion is not the court of last resort.

In addition to those already mentioned, there are other cases supporting plaintiff's view, including the clear holding in *Dorberg* v. *The Dow Chemical Co.*, (E.D. Pa.)

195 F. Supp. 337. They have been given serious consideration in reaching the conclusion expressed herein.

For the assistance of those reviewing this ruling there are attached hereto summaries of the principal points and authorities relied upon by the plaintiff and the defendants in this matter, marked Exhibits C and D respectively.

William H. Becker,
District Judge.

Kansas City, Missouri,
August 3, 1962

EXHIBIT A.

BRIEF SUMMARY OF LEGISLATIVE HISTORY OF SECTION 4B OF CLAYTON ACT.

The following list shows the bills considered by various congresses prior to the adoption of H.R. 4954 by the First Session of the 84th Congress:

81st Congress, 1st Session

S. 1910, H.R. 4985

(1) a six-year statute of limitations for private treble damage suits;

(2) in the case of conspiracy, six years after the date of discovery of the facts upon which the plaintiff relies.

81st Congress, 2nd Session

H.R. 7905

(1) United States may recover actual damages;

(2) six-year statute for both Government and private damage suits;

(3) six years after discovery for both United States and private plaintiffs;

(4) suspension of statute during pendency of Government criminal or civil suit applicable to damage suits of United States as well as private plaintiffs;

(5) judgment in Government criminal or civil case conclusive evidence against a defendant in suits for damages both by the United States and private plaintiffs.

H.R. 8763

(1) United States may recover actual damages;

(2) any action for damages by United States or private plaintiffs shall be forever barred unless commenced within six years after the cause of action accrued;

(3) suspension of statute during pendency of Government criminal, civil or *damage* suit, applicable to private suits;

(4) judgment in Government criminal or civil case (but not in Government damage suit) *prima facie* evidence in damage suits both by United States and private plaintiff.

82nd Congress, 1st Session

H.R. 3408 and 1323

identical with H.R. 8763 (1950).

H.R. 1986

six years after discovery of facts by private plaintiff.

H.R. 109

treble damages in Government suits.

83rd Congress, 1st Session.

H.R. 467

(1) five-year statute of limitations applicable to Government and private damage suits;

(2) when suspended by Government criminal or civil suit, private suit had to be commenced either during period of suspension, or within five years after cause of action accrued;

(3) causes of action barred by state statutes on the effective date of the act would not be revived;

(4) eliminated provision suspending statute during pendency of Government damage suit.

EXHIBIT B.

CELLER - PATMAN COLLOQUY

"Mr. Patman: Mr. Chairman, after the word 'accrued' in line 7, page 2, I have an amendment prepared to include the phrase 'and became known', so as to make it clear that the cause of action or that limitation would not commence to run against a cause of action until it is discovered, until it became known, and, therefore, I would like to ask the chairman of the committee this question: Is it your understanding, Mr. Chairman, that the cause of action will not commence to run, the limitation will not commence to run on the cause of action until after it is discovered, 4, 6 or 10 years hence?

"Mr. Celler: The statute of limitations will start running from the time the action accrues, not from the time of discovery. If you make it time of discovery, then you practically have no statute of limitations at all. An action could have accrued and the person aggrieved might

not have heard of it for 20 years. Under the suggested amendment he would have a right to bring an action after 20 years, after the evidence will have been lost, and the defendant would be put in a rather deplorable situation in that regard. *We provide that the 4-year statute shall start to run from the time the wrong was done, not from the time of discovery.*

"Mr. Patman: Even in the case of fraud or conspiracy?

"Mr. Celler: No. In the case of fraud or conspiracy the statute of limitations only runs from the time of discovery.

"Mr. Patman: That is the point I wanted to make sure of. You are not attempting to change that particular part of it?

"Mr. Celler: Not at all.

"Mr. Patman: Mr. Chairman, the proposal for inserting the words 'and become known' after the word 'accrued' in line 7, page 2, is to emphasize and make clear in the law that the period of limitations shall not commence to run until at least covert wrongs have been discovered. We should make certain that in enacting a uniform Federal statute of limitations we will not be acting to limit the damage period to 4 years, even though a monopolistic conspiracy may have lasted for 10 years before the victim even knew of its existence. Perhaps the amendment I propose will not insure fully against such unjust result, but it will serve to improve the provision which has been presented in H.R. 4954 in making certain that the action is not barred until a period of 4 years after the victim learned of the existence of his cause of action." 101 Cong. Rec. 5132-33 (1955).

EXHIBIT C.

PLAINTIFF'S POINTS AND AUTHORITIES.

I.

The applicability of the Federal Doctrine of Fraudulent Concealment to Section 4B of the Clayton Act is not a case of first impression. Two previous cases have involved the same question and have applied the doctrine to toll Section 4B of the Clayton Act.

Moviecolor, Ltd., v. *Eastman Kodak Co.*, 288 F.2d 80 (2nd Cir. 1961), Cert. denied 368 U.S. 821 (1961).

Dovberg v. *Dow Chemical Co.*, 195 F. Supp. 337 (E.D. Pa. 1961).

Both cases state that the doctrine of Federal Fraudulent Concealment tolls the running of the statute of limitations contained in the Clayton Act.

II.

The Federal Doctrine of Fraudulent Concealment is read into every statute of limitations governing federally created rights unless a clear unequivocal intent to the contrary is expressed by the Congress.

Sherwood v. *Sutton*, 5 Mason, 143, Fed. Cas. No. 12,782 (D.N.H. 1828).

Bailey v. *Glover*, 88 U.S. (21 Wall.) 342 (1875).

Traer v. *Clews*, 115 U.S. 528 (1885).

Kirby v. *Lake Shore R.R.*, 120 U.S. 130 (1887).

Exploration Co. v. *United States*, 247 U.S. 435 (1918).

Holmberg v. *Armbrecht*, 327 U.S. 392 (1946).

It should be noted that the Supreme Court in the *Holmberg* case states that the equitable doctrine of Fraudulent Concealment is read into every federal statute of limitation.

III.

The clear expression of the congressional intent requires the application of the Federal Doctrine of Fraudulent Concealment to Section 4B of the Clayton Act.

The Supreme Court of the United States has never refused to apply doctrine of Fraudulent Concealment to any statute of limitation nor has it ever announced that a substantive statute of limitation is immune to equitable considerations.

Grossman v. *Young*, 72 F. Supp. 375 (S.D.N.Y. 1947).

Glus v. *Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959).

The *Glus* case would seem to dispel any remaining doubt that equitable considerations can toll a statute of limitation incorporated into a statutory cause of action.

The colloquy between Congressman Patman and Congressman Celler on the floor of the House clearly reveals that Congress intended the doctrine of Fraudulent Concealment would toll the statute of limitation of the Clayton Act (Cong. Rec., Vol. 101, Part 4, pp. 5132-3, 84 Cong. Fed. Sess. (1955)).

> "Mr. Patman: Even in the case of fraud or conspiracy?
>
> "Mr. Celler: No, in the case of fraud or conspiracy the statute of limitation only runs from the time of discovery."

Congressman Celler as chairman of the House Judiciary Committee and Floor Manager of the bill clearly recognized the distinction between a *discovery bill* which was rejected and *the then existing doctrine of Fraudulent Concealment.*

IV.

The discovery doctrine and the Federal Doctrine of Fraudulent Concealment are absolutely different and have no relation to each other.

Tinkoff v. *United States*, 211 F.2d 890 (7th Cir. 1954).

Suckow Borax Mines Consolidated, Inc., v. *Borax Consolidated, Ltd.*, 185 F.2d 196 (9th Cir. 1950).

Moviecolor, Ltd., v. *Eastman Kodak Co.*, 288 F.2d 80 (2nd Cir. 1961) Cert. Denied 368 U.S. 821 (1961).

Dovberg v. *Dow Chemical Co.*, 195 F. Supp. 337 (E.D. Pa. 1961).

V.

The applicability of the Federal Doctrine of Fraudulent Concealment will not abrogate the congressional intent for uniformity because this doctrine is read into every federal statute of limitation.

Holmberg v. *Armbrecht*, 327 U.S. 392 (1946).

The language adopted by Congress under which the limitation period begins after a cause of action "accrues" itself indicates that the Fraudulent Concealment Doctrine is applicable, because it has been held that causes of action do not accrue when there is concealment until after the concealment is broken.

Exploration Co. v. *United States*, 247 U.S. 435 (1918).

Kirby v. *Lake Shore R.R.*, 120 U.S. 130 (1887).

Kicklighter v. *New York Life Ins. Co.*, 145 F.2d 548 (5th Cir. 1944).

EXHIBIT D.

DEFENDANTS' POINTS AND AUTHORITIES.

I.

This is a case of first impression. Cases such as *American Tobacco Company, Crummer, Philco, Norman* and *Moviecolor* dealt with state statutes of limitations which were applicable prior to the enactment of Section 4B of the Clayton Act. Since the state statutes were statutes of general application not enacted by the sovereign that created the right which plaintiff asserts, they must be regarded as procedural and subject to the federal rule that procedural statutes are tolled by fraudulent concealment. The discussion of the application of the doctrine of fraudulent concealment to Section 4B of the Clayton Act, which is found in *Moviecolor*, is, by the court's own admission, merely dicta and is not persuasive.[1]

American Tobacco Company v. *People's Tobacco Company*, 204 Fed. 58 (5th Cir. 1913).

Crummer Company v. *DuPont*, 117 F. Supp. 870 (N.D. Fla. 1954), 223 F.2d 38 (5th Cir. 1955), 255 F.2d 425 (5th Cir. 1958).

Philco Corp. v. *Radio Corporation of America*, 186 F. Supp. 155 (E.D. Pa. 1960).

Norman Tobacco and Candy Co. v. *Gillette Safety Razor Corp.*, 197 F. Supp. 333 (N.D. Ala. 1960).

Moviecolor, Limited, v. *Eastman Kodak Co.*, 288 F.2d 80 (2nd Cir. 1961).

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1. Had there in fact been a question of limitations in *Dovberg* v. *The Dow Chemical Company*, 195 F. Supp. 337 (E.D. Pa. 1961), Section 4B of the Clayton Act would have been involved. However, there was no reason to consider the statute of limitations in that case and the court's discussion of the problem must be regarded as dicta.

II.

Congress has the power to enact a definitive statute of limitations which is not subject to tolling for any reason whatsoever.

Holmberg v. *Armbrecht*, 327 U.S. 392, 395 (1946).

Unexcelled Chemical Corp. v. *United States*, 345 U.S. 59, 64 (1953).

Adams v. *Albany*, 80 F. Supp. 876, 881 (S.D. Cal. 1948).

Congress in enacting Section 4B of the Clayton Act plainly and unequivocally barred all claims under Section 4 of the Clayton Act filed more than four years after such claims accrued. Inasmuch as the language of Section 4B is plain and unequivocal, there is no need to resort to other aids of statutory construction.

Unexcelled Chemical Corp. v. *United States*, 345 U.S. 59, 64 (1953).

Soriano v. *United States*, 352 U.S. 270 (1957).

United States v. *Borin*, 209 F.2d 145, 147 (5th Cir. 1954), cert. den. 348 U.S. 821 (1936).

Adams v. *Albany*, 80 F. Supp. 876, 881 (S.D. Cal. 1948).

Conclusive proof that there was to be no implied exception to the bar created by Section 4B is found in the fact that at the same time Congress expressly enacted in Section 5(b) the one exception to the absolute bar contained in Section 4B. Where Congress has used general mandatory language and has imposed one or more explicit exceptions, the Court has no power to read in an additional exception.

Soriano v. *United States*, 352 U.S. 270 (1957).

Kendall v. *United States*, 107 U.S. 123, 125 (1883).

III.

Section 4B, being a substantive part of the statute creating a cause of action, extinguishes the cause of action and cannot be tolled except by express legislative authority. The courts have consistently held that where the time for commencing an action is prescribed in the statute which creates the liability and gives the right of action, the time is not extended by reason of fraud or concealment which might work an extension of ordinary statutes of limitations.

Pollen v. *Ford Instrument Co.*, 108 F.2d 762 (2nd Cir. 1940).

The Harrisburg, 119 U.S. 199 (1886).

A. J. Phillips Co. v. *Grand Trunk Western Railway Co.*, 236 U.S. 662 (1915).

Scott v. *Railroad Retirement Board*, 227 F.2d 684 (7th Cir. 1955).

United States ex rel. Texas Portland Cement Co. v. *McCord*, 233 U.S. 157 (1914).

Leimer v. *Woods*, 196 F.2d 828 (8th Cir. 1952).

United States v. *Borin*, 209 F.2d 145 (5th Cir. 1954) Cert. den. 348 U.S. 821 (1956).

Adams v. *Albany*, 80 F. Supp. 876 (S.D. Cal. 1948).

See also, *Frazee* v. *Partney*, 314 S.W.2d 915 (S. Ct. Mo. 1958).

As long as the statute of limitations is specifically directed at the right created by statute, it is immaterial that the limitations provision may be contained in a different statute or may have been passed subsequent to the enactment of the statute creating the right.

Davis v. *Mills*, 194 U.S. 451 (1904).

Midstate Horticultural Co. v. *Pennsylvania R. Co.*, 320 U.S. 356 (1943).

IV.

The legislative history of Section 4B is consistent with the plain meaning of the statutory language. During the six years prior to the enactment of Section 4B in 1955, Congress had before it numerous bills to establish a uniform federal statute of limitations for treble damage antitrust actions. Congress was repeatedly urged to insert a fraudulent concealment exception and held extensive hearings on the advisability of such an exception, but consistently refused to adopt any such proposals.

See schedule appearing at pages 16-18 of brief filed by co-defendants.

The eleventh-hour colloquy between Congressman Patman and Congressman Celler on the floor of the House (Cong. Rec. Vol. 101, part 5, pp. 5132-33, 84th Cong., 1st Sess. (1955)) cannot be given any weight in view of the consistent refusal of both the House and Senate to include a fraudulent concealment exception.

Pennsylvania R.R. Co. v. *International Coal Mining Co.*, 230 U.S. 194 (1913).

Federal Trade Commission v. *Anheuser-Busch, Inc.*, 363 U.S. 536 (1960).

Brown Shoe Co. v. *United States*, U.S. , CCH 1962 Trade Cases, Par. 70,366, decided June 25, 1962.

V.

If the doctrine of fraudulent concealment is read into Section 4B, the Congressional effort to establish a uniform federal statute of limitations to replace the multiple statutory limitations periods resulting from applying state laws will be completely nullified and every conspiracy case will have its own individual statute of limitations. Certainly this is contrary to Congressional intent.

APPENDIX B.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

ATLANTIC CITY ELECTRIC COMPANY, *et al.*,
Plaintiffs,
against
GENERAL ELECTRIC COMPANY, *et al.*,
Defendants.
} 61 Civ. 4258 and Related Cases.

Webster Sheffield Fleischman Hitchcock & Chrystie, Esqs., of New York, N. Y.,

Kaye, Scholer, Fierman, Hays & Handler, Esqs., of New York, N. Y.,

Attorneys for Plaintiffs, Atlantic City Electric Company, *et al.*,

Milton Handler, Esq.,
Bethuel M. Webster, Esq.,
Edward M. Freeman, Esq., and
James B. Henry, Jr., Esq., of Counsel.

Winthrop, Stimson, Putnam & Roberts, Esqs., of New York, N. Y.,

Attorneys for Plaintiffs, Consumers Power Company, *et al.*

LeBoeuf, Lamb & Leiby, Esq., of New York, N. Y.,

Attorneys for Plaintiffs, Arkansas Power & Light Company, *et al.*,

Horace R. Lamb, Esq., and
Taylor R. Briggs, Esq., of Counsel.

Reid & Priest, Esqs., of New York, N. Y.,

Coudert Brothers, Esqs., of New York, N. Y.,
Attorneys for Plaintiffs, Dallas Power & Light Company, *et al.*,
Joseph A. McManus, Esq.,
Clifford D. Root, Esq., and
James C. Pressey, Esq., of Counsel.

Thomas F. Moore, Jr., Esq., of New York, N. Y.,
Attorney for Plaintiff, Power Authority of the State of New York.

Louis J. Lefkowitz, Esq., of New York, N. Y.,
Attorney for Plaintiff, The People of the State of New York, *et al.*

Sidney Goldstein, Esq., of New York, N. Y.,
Attorney for Plaintiff, The Port of New York Authority.

Naylon, Foster, Dean & Aronson, Esqs., of New York, N. Y.,
Attorneys for Plaintiffs, New York State Electric & Gas Corporation, *et al.*,
Edward F. Huber, Esq., of Counsel.

White & Case, Esqs., of New York, N. Y.,
Attorneys for Defendant, General Electric Company,
Edgar E. Barton, Esq., of Counsel.

Austin, Burns, Appell & Smith, Esqs., of New York, N. Y.,
Attorneys for Defendant, Ingersoll-Rand Company,
Joseph W. Burns, Esq., of Counsel.

Brown, Wood, Fuller, Caldwell & Ivey, Esqs., of New York, N. Y.,
Attorneys for Defendant, A. B. Chance Company.

Hughes, Hubbard, Blair & Reed, Esqs., of New York, N. Y.,
Attorneys for Defendant, Allen-Bradley Company.

Davis Polk Wardwell Sunderland & Kiendl, Esqs., of New York, N. Y.,
Attorneys for Defendants, Allis-Chalmers Manufacturing Company, *et al.*

Wickes, Riddell, Bloomer, Jacobi & McGuire, Esqs., of New York, N. Y.,

Attorneys for Defendants, C. H. Wheeler Manufacturing Company, *et al.*

Richard Owen, Esq., of New York, N. Y.,

Attorney for Defendant, Cole Electric Products Company.

Proskauer, Rose, Goetz & Mendelsohn, Esqs., of New York, N. Y.,

Attorneys for Defendants, Cornell-Dubilier Electric Corporation, *et al.*

Kissam & Halpin, Esqs., of New York, N. Y.,

Attorneys for Defendant, Cutler-Hammer, Inc.

Meyer, Kissel, Matz & Seward, Esqs., of New York, N. Y.,

Attorneys for Defendant, Foster-Wheeler Corporation.

Alexander & Green, Esqs., of New York, N. Y.,

Attorneys for Defendants, H. K. Porter Company, Inc., *et al.*

Satterlee, Warfield & Stephens, Esqs., of New York, N. Y.,

Attorneys for Defendant, Hubbard and Co.

Haight, Gardner, Poor & Havens, Esqs., of New York, N.Y.,

Attorneys for Defendant, I-T-E Circuit Breaker Company.

Stickles, Hayden, Young, Kennedy & Hort, Esqs., of New York, N.Y.,

Attorneys for Defendants, Joslyn Mfg. & Supply Co., *et al.*

Casey, Lane & Mittendorf, Esqs., of New York, N. Y.,

Attorneys for Defendant, Kuhlman Electric Company.

Cleary, Gottlieb & Steen, Esqs., of New York, N. Y.,

Attorneys for Defendants, Moloney Electric Company, *et al.*

Sheridan & Madigan, Esqs., of New York, N. Y.,

Attorneys for Defendant, Murray Electric Company.

Kupfer, Silberfeld, Nathan & Danziger, Esqs., of New York, N. Y.,
Attorneys for Defendant, Norbute Corporation.

Laporte & Meyers, Esqs., of New York, N. Y.,
Attorneys for Defendant, Schwager-Wood Corporation.

Clark, Carr & Ellis, Esqs., of New York, N. Y.,
Attorneys for Defendant, Southern States, Inc.

Allan D. Emil, Esq., of New York, N. Y.,
Attorney for Defendant, Square D Company.

Close, Griffiths, McCarthy & Gaynor, Esqs., of New York, N. Y.,
Attorneys for Defendant, Ward Leonard Electric Company.

FEINBERG, D. J.:

Defendants in 418 related treble damage actions[1] brought under the Clayton Act (15 U.S.C. §15) have moved under Rule 12(f), Fed. R. Civ. P., to strike material from plaintiffs' complaints. Plaintiffs are public utilities, state and local governmental agencies or units and industrial corporations. Defendants include large national manufacturers of heavy electrical equipment. Comparable private treble damage suits have been instituted over the nation, and roughly 1800, including those in this District, are now pending. The impetus for this massive litigation was supplied by criminal and civil injunctive proceedings brought by the United States Government against many of these defendants in 1960 in the Eastern District of Pennsylvania; the complaints before this Court were filed between November, 1961 and March, 1962.

The complaints generally allege that defendants combined and conspired to fix prices and rig bids with respect

1. Each action affects two or more defendants; 39 have been named in all. There are over 100 plaintiffs in the actions which state more than 1700 claims.

to the sale of specified electrical equipment[2] and that plaintiffs' damages are based on their purchases from defendants during a period ranging from at least the 1940's to 1960.[3] Most of the complaints also allege that defendants actively and fraudulently concealed the existence of the alleged conspiracy, and that plaintiffs neither knew of the conspiracy nor, by the exercise of reasonable diligence, could have gained knowledge of its existence until they learned of the government suits in 1960.

Three motions by defendants were brought on by notice of motion dated May 25, 1962; on successive days in June, the motions were ably argued on the basis of thorough and well-reasoned briefs. The first motion, to which this opinion is limited, is based upon the applicable four-year statute of limitations, Section 4B of the Clayton Act ("Section 4B").[4] Defendants move to strike from the complaints all allegations of damages claimed for any period

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2. The general product groups affected by the alleged conspiracies are: bushings, circuit breakers, condensers, distribution transformers, hydro-electric generators, industrial control equipment, instrument transformers, insulators, isolated phase buses, lightning arresters, low voltage distribution equipment, low voltage power circuit breakers, meters, network transformers, open fuse cutouts, power capacitors, power switchboards and control equipment, power switchgear assemblies, power switching equipment, power transformers, turbine generators.

3. The initial and terminal dates of the alleged conspiracies and the dates of alleged purchases by plaintiffs vary. In some cases the conspiracies alleged began as late as January, 1956, and January, 1958, so that limitations problems in these actions are absent or perhaps minimal.

4. "Limitation of actions. Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections." 15 U.S.C., §15b.

prior to the time period indicated by Section 4B and the related Section 5(b),[5] as well as allegations of fraudulent concealment of any alleged unlawful combination or conspiracy. Illustrative of allegations to which this motion is addressed are these:

> "Beginning at least as early as January, 1948 and continuing thereafter until at least as late as June, 1960, the defendants, co-conspirators and other persons presently unknown have engaged in a combination and conspiracy in restraint of interstate trade and commerce in turbine-generators in violation of § 1 of the Sherman Act (15 U.S.C. § 1).
>
> * * * * * * *
>
> "The defendants and co-conspirators used various devices and practices to conceal the existence of their conspiracy. . . . The defendants and co-conspirators also rigged price quotations and bids to purchasers and so represented their prices to plaintiffs as to create the semblance of competitive bidding and pricing and thereby deceived plaintiffs into thinking that they were receiving competitive prices. By reason of these and other deliberate acts, the defendants and co-conspirators fraudulently concealed the existence of their combination and conspiracy and plaintiffs had no

5. "Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws; but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however*, That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued." 15 U.S.C., §16(b).

knowledge and could not by the exercise of reasonable diligence have obtained knowledge of the existence of the combination and conspiracy until the institution of the proceedings described in paragraph 15."[6]

The crucial question for determination is one of statutory construction; *i. e.*, is Section 4B construed to allow its four-year time period to be tolled by fraudulent concealment? In support of the proposition that it is not,[7] defendants, *inter alia*, rely on the wording of the statute, the legislative history of Section 4B, and a contention that the statute cannot be suspended on a non-statutory ground because it is substantive and not procedural in character. Plaintiffs argue principally that a doctrine of fraudulent concealment is read into every federal statute of limitations; the legislative history of Section 4B demonstrates that fraudulent concealment applies to private damage actions for antitrust violations, "artificial" formulae such as "substantive-procedural" notwithstanding, and the Court of Appeals for the Second Circuit in *Moviecolor, Ltd.*, v. *Eastman Kodak Co.*[8] has held that fraudulent concealment tolls Section 4B of the Clayton Act.

I am persuaded that *Moviecolor* provides the complete answer to all of defendants' contentions; therefore, I will

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6. 61 Civ. 4258, paras. 12, 16.

7. "Defendants contend that all causes of action accruing more than four years prior to the date of institution of the proceedings by the United States relative to the same product and matter complained of in each complaint are barred. . . . Where no proceeding by the United States related to the same matter and product covered by a complaint, or where a defendant here was not a party to a proceeding related to such matter and product, all claims asserted therein which accrued more than four years prior to the filing of the complaint are barred." Brief for Defendants, pp. 2-3.

8. 288 F.2d 80, *cert. denied* 368 U.S. 821 (1961), *aff'g* 1960 Trade Cas. ¶69,692 (S.D. N.Y. 1960).

discuss the case in some detail. Initially, I note that the parties concede that Section 4B applies to cases filed after January 7, 1956, whatever the date of accrual of the cause of action;[9] they differ only on the effect of concealment.

I.

Moviecolor was an action for treble damages under Section 4 of the Clayton Act. Plaintiff Moviecolor was a British corporation formed in 1929 and dissolved in 1939. Its action presumably accrued in 1929 or the early 1930's but was not brought until 1959.[10] Section 4B was asserted as a defense in the answers. Defendants then moved for judgment on the pleadings under Rule 12(c), Fed. R. Civ. P., claiming that the action was barred by "both the applicable state and federal statutes of limitations."

The District Court judge granted the motion. He pointed out that Section 4B had become effective on January 7, 1956, that prior to that time the federal courts looked to the statute of limitations of the states in which they sat, and that Section 4B made clear that if, on its effective date, state law barred the claim, Section 4B would not revive it. Therefore, he examined the New York statute of limitations (N.Y.C.P.A. § 48(2)) to see whether the claim was barred on January 7, 1956. The District Court judge held that under New York law fraudulent concealment did not toll the New York statute of limitations. The crucial issue, therefore, was whether what he called "the federal equi-

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9. See *Herman Schwabe, Inc., v. United Shoe Machinery Corp.*, 274 F.2d 608 (2 Cir.), *cert. denied* 363 U.S. 811 (1960) (4B to be given retroactive interpretation). My opinion does not deal with the question of when the various causes of action accrued.

10. The action, brought by a "liquidator" of plaintiff corporation named in 1955, was characterized by one of the defendants as a "stale claim by a phantom plaintiff."

table doctrine" of *Bailey* v. *Glover*, 88 U.S. (21 Wall.) 342 (1874), was available to toll the state statute. He concluded that it was not, even though the action was brought to enforce a federally created right, because the action was at law rather than in equity. It is clear from the opinion that the District Court would have reached a contrary result, on the authority of *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946), had the action been in equity.

Thereafter, plaintiff appealed. In an opinion by Judge Friendly speaking for a unanimous Court, the reasoning of the holding below was explicitly overruled. The Court stated (288 F.2d at 83):

> "We hold that the federal rule as to the effect of concealment on the running of a period of limitation applies to an action for treble damages under the Clayton Act even when a state statute is used to measure the period. . . ."

The Court of Appeals, however, did not reverse the judgment of the District Court. It went on to consider the additional question of whether plaintiff's complaint alleged facts sufficient to bring it "within the federal concealment rule."[11] Since it concluded that the complaint did not meet that test, the judgment for defendants was affirmed.

Defendants attempt to minimize the controlling effect of *Moviecolor*. They urge that *Moviecolor* is not a holding that the fraudulent concealment doctrine applies to Section 4B but is *dictum* at best, that the decision applies only to a state statute of limitations, and is inapplicable to the main issue here.[12] They attempt to buttress this position by contending that the issue of whether Section 4B is tolled

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11. 288 F.2d at 86.

12. Brief for Defendants, pp. 44, 47. Consistent with that position, defendants do not argue that the actions are barred by state statute.

by fraudulent concealment was not fully briefed before the Court of Appeals.[13] However, analysis of *Moviecolor* compels the conclusion that the appellate court necessarily found that fraudulent concealment applies to Section 4B.

The complaint in *Moviecolor* was filed in 1959 on a claim which had aged for almost 30 years. The lower court explicitly,[14] and the Court of Appeals implicitly, recognized that Section 4B applied to the complaint before it.[15] If the doctrine of fraudulent concealment did not apply to the action in *Moviecolor* and, therefore, did not toll the four year time limit of Section 4B, then the action was clearly barred since the claim arose almost 30 years before. Only if the doctrine of fraudulent concealment *did* apply and *did* toll Section 4B was it necessary for the Court of Appeals to reach the next question: was the action already barred by state law before the effective date of Section 4B? This inquiry was required because Section 4B also states that no action already barred under state law prior to the effective date of Section 4B shall be revived by Section 4B.[16] This, too, had been recognized by the Court below.[17] Therefore, to reach the ultimate issue decided in *Moviecolor*—that the federal fraudulent concealment doctrine also tolled the New York statute of limitations—the Court of Appeals first decided that fraudulent concealment was an existing federal doctrine and that it attached to Section 4B.

The Court of Appeals further decided, on policy grounds and the imputed purpose of Congress, that a uni-

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13. Reply brief for Defendants, p. 36.

14. 1960 Trade Cas. at 76,727.

15. The *Schwabe* case, *supra*, note 11, made this clear.

16. "No cause of action barred under existing law on the effective date of this section . . . shall be revived . . ." 15 U.S.C. §15(b).

17. 1960 Trade Cas., at 76,728.

form rule was to be preferred in the federal courts on the effect of the wrongdoer's concealment on the measuring period. This explains the significance of the word "even" in the holding already quoted above (288 F.2d at 83):

> "the federal rule as to the effect of concealment on the running of a period of limitation applies to an action for treble damages under the Clayton Act *even* when a state statute is used to measure the period . . ." (Emphasis supplied).

The Court was satisfied that the result was in accord with legislative intent. Thus, it stated (*id.* at 84):

> "It seems far more likely that Congress would have desired the federal suitor it was creating to have the benefit of the federal rule prolonging the period of suit during concealment by the wrongdoer. This is particularly so when, as under the Clayton Act, enforcement of the right often serves not merely private but public ends . . ."

It reinforced this reference to Congressional intent by the following footnote (*ibid*):

> "The debates on the 1955 amendment of the Clayton Act to provide its own period of limitation for treble damage actions, 69 Stat. 283, include statements by Representative Celler, chairman of the House Judiciary Committee, in answer to a question by Representative Patman, that under existing law the period of limitation ran only from discovery and that the new statute would not change that. 101 Cong. Rec. 5129, 5130, 5133 (1955)."

Moviecolor makes abundantly clear the view of the Court of Appeals that fraudulent concealment applies to Section 4B.[18] It is this view which defendants say is *dic-*

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18. *Cf.* 75 Harv. L. Rev. 627 (1962) which criticizes the court's failure to borrow the entire New York law on fraudulent concealment, but states (at p. 629): "That the New York legis-

tum and may, therefore, be disregarded. Whether that view is *dictum* is questionable, since I believe it was an essential element in the process of decision. But, in any event, even if it is *dictum*, its controlling effect is undiminished. Although the appeal could have been disposed of on the basis of the inadequacies of the complaint alone, the Court of Appeals made clear that it would consider broader issues and why it was doing so (288 F.2d at 83):

> "we affirm on the ground that the complaint does not contain allegations sufficient to bring plaintiff within this federal rule. Although we could dispose of this appeal solely on the latter ground, we think it proper to deal also with the important question of law decided by the District Court, since the issue has been fully argued, the decisions in the Southern District are in conflict, and the problem is likely to recur."

Therefore, it underlined the fact that its views on the subject of "the federal rule as to the effect of concealment on the running of a period of limitations" were carefully considered.[19] Moreover, the argument that *Moviecolor* should be disregarded because the question was inadequately presented to the Court of Appeals rests upon a number of questionable hypotheses. It assumes that even if this assertion were true, this Court should disregard the judgment of its

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lature did not include a rule of concealment may be the reason that it made the period of limitations as long as six years; in the recently enacted federal statute that now governs limitations in Clayon Act suits, for example, the specified period is four years, *and, of course, concealment applies.*" (emphasis supplied).

19. See *General Electric Co.* v. *Hygrade Sylvania Corp.*, 61 F. Supp. 476, 525-526 (S.D. N.Y. 1944) ("judicial" and "obiter" dicta distinguished); *United States* v. *Ellis*, 264 F.2d 325, 328 (2 Cir. 1959) ("frequently the pronouncement characterized as dictum rests upon a quite solid foundation"); *but cf. Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821); *Nolan* v. *Transocean Air Lines*, 290 F.2d 904, 906 (2 Cir.), *cert. denied* 368 U.S. 901 (1961).

senior court. It assumes that because the legislative history of Section 4B was not briefed in the Court of Appeals in *Moviecolor*, that Court's study of the legislative history was incomplete. It further assumes that because some of the cases upon which defendants rely were not discussed in the opinion of the Court of Appeals, they may not have been considered by that Court, and that consideration of these cases would lead to a different result.[20] I cannot agree with these assumptions. Accordingly, on what I conceive to be the clear authority of *Moviecolor*, defendants' motion is denied.[21] On this view of the case, it is not necessary to deal with the other contentions of the parties.

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20. Defendants urge that the Court of Appeals would reconsider its action in the light of *United States* v. *Borin*, 209 F.2d 145 (5 Cir. 1954) or its earlier decision in *Pollen* v. *Ford Instrument Co.*, 108 F.2d 762 (2 Cir. 1940). But the *Pollen* case was cited by defendant Eastman Kodak both to the District Court and the Court of Appeals in *Moviecolor* (see memorandum in support of its motion in the District Court to dismiss the complaint, p. 14; brief of defendant-appellee in the Court of Appeals, p. 29). In addition, the *Borin* case was cited to the District Court (defendant Eastman Kodak memorandum *op. cit. supra* p. 18). But *cf. Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959) and *Grossman* v. *Young*, 72 F. Supp. 375 (S.D. N.Y. 1947) which plaintiff cited to the Court of Appeals in *Moviecolor*. Brief for plaintiff-appellant pp. 9, 10, 18.

21. *Cf. Gaetzi* v. *Carling Brewing Co.*, Trade Reg. Rep. (1962 Trade Cas.) ¶70,339 (E.D. Mich. 1962) (doctrine of fraudulent concealment held applicable to Section 4B, but motion for summary judgment granted; doctrine held inapplicable on the undisputed facts); *Dovberg* v. *Dow Chemical Co.*, 195 F. Supp. 337 (E.D. Pa. 1961) (motion for summary judgment on the ground that Section 4B barred the claim denied, holding that complaint sufficiently alleged fraudulent concealment); a contrary holding, according to the information furnished the Court, has been made in *Brigham City Corp.* v. *General Electric Co.* (D. Utah 1962) (unreported).

II.

Under 28 U.S.C., § 1292(b), an interlocutory appeal otherwise not available may be had in a civil action if the District Judge "shall be of the opinion" that the order in question: (1) "involves a controlling question of law," (2) "as to which there is substantial ground for difference of opinion," and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation."[22] Since this antitrust litigation exemplifies the type of case which in part prompted the enactment of Section 1292(b),[23] I will consider the question of whether to certify an appeal from the order to be entered on this motion.

The first and third statutory criteria stated above are clearly met. *Herman Schwabe, Inc.* v. *United Shoe Machinery Corp.*, 274 F.2d 608 (2 Cir.) *cert. denied*, 363 U.S. 811 (1960); *Banana Distributors, Inc.* v. *United Fruit Co.*, 269 F.2d 790 (2 Cir. 1959). As to the second, the practical problem here is whether a four year cut-off period will

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22. Section 1292(b) also provides that: "The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken. . . ."

23. "The bill results from a growing awareness of the need for expedition of cases pending before the district courts. . .

"There are many civil actions from which . . . illustrations could be furnished. For example, in an antitrust action a plea may be entered that the claim is barred by the statute of limitations. If this motion is denied, under existing law the matter is not appealable and the case then goes forward to trial. Disposition of antitrust cases may take considerable time, yet upon appeal following final disposition of such cases, the court of appeals may well determine that the statute of limitations had run and for that reason the district court did not have jurisdiction." S. Rep. No. 2434, 85 Cong., 2d Sess., reprinted in U. S. Code Cong. & Ad. News 5255, 5256 (1958). See *Milbert* v. *Bison Laboratories, Inc.*, 260 F.2d 431, 433 (3 Cir. 1958).

be applied to claims which might otherwise, in some cases, go back to the 1940's. Determination of this question affects the scope of discovery procedure, the length and complexity of ultimate trial, and the expenditure of time, money and effort which these cases will engender. These are strong reasons for having the issue of construction of Section 4B conclusively determined and determined expeditiously. Therefore, in determining whether there is "substantial ground for difference of opinion" as to the conclusive effect of *Moviecolor*, a narrow approach is not justified. While I believe *Moviecolor* decided the issue of construction of Section 4B, I also feel that there is "substantial ground for difference of opinion" as to whether it did. On the related question of whether there is substantial ground for difference of opinion on the construction of Section 4B if *Moviecolor* is not deemed to be controlling, the test is clearly met. Without exploring the parties' contentions, their extensive analysis of the legislative history of Section 4B makes clear that here is an issue which is substantial.

Accordingly, the order will provide that I am of the opinion that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion, and that immediate appeal from the order may materially advance the ultimate termination of the litigation.

Settle order on notice.

Dated: New York, N. Y.

July 11, 1962

/s/ Wilfred Feinberg
U. S. D. J.